

## The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?

When a testator's will fails to provide for the disposition of his entire estate, the portion of the estate that is not disposed of usually passes to the testator's heirs under the intestacy laws.<sup>1</sup> These laws reflect a presumption about what the testator would have wanted had he considered the matter.<sup>2</sup> In some cases, however, the testator may have expressed a contrary intent. For example, a will may expressly disinherit an heir and leave the estate to someone else; or it may leave a small sum "and no more" to an heir, while giving the bulk of the estate to someone else; or a "will" may contain no devise at all, but express a desire that an heir receive no part of the estate.<sup>3</sup> If the will does not fully dispose of the testator's property and some or all of his estate must pass by intestacy, an issue arises as to whether the intestacy statute requires the excluded heir to receive an intestate share, contrary to the testator's intent.

This comment discusses the circumstances in which a will that expressly disinherits an heir or limits the heir's gift to the devise in the will (a "negative will") may foreclose the award of an intestate share to that heir where some or all of the testator's estate passes by intestacy. Since the mid-nineteenth century, English courts have enforced negative wills where (1) the testator clearly intended to exclude an heir or to limit an heir's share in the estate to the devise in the will, and (2) at least one other heir remains eligible to take the property that passes by intestacy.<sup>4</sup> Under this approach, the exclusion of the heir (or limitation of the heir's gift) in the will

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<sup>1</sup> See, e.g., UNIF. PROBATE CODE § 2-101 (1983); 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 1.1, at 1-2 (rev. ed. 1960).

<sup>2</sup> See *infra* note 39 and accompanying text.

<sup>3</sup> For examples of attempts to exclude an heir or limit the amount of an heir's gift, see cases cited *infra* note 6. This comment will use the term "will" to include an instrument, complying with Wills Act formalities, that purports solely to disinherit or limit an heir without making an affirmative distribution of any property, although such an instrument may not be considered testamentary under current law, see, e.g., 4 W. BOWE & D. PARKER, *supra* note 1, § 30.17, at 115-16. The word "testator" will be used to refer to the maker of such an instrument.

<sup>4</sup> See *infra* notes 16-19 and accompanying text; see also *infra* note 23 (discussing requirement that at least one heir remain eligible to take).

is treated as an implied gift of that heir's share under the intestacy statute to the testator's other heirs.<sup>5</sup> Nearly all American courts, however, have held that the heir is entitled to his intestate share despite the testator's expression of a contrary intent.<sup>6</sup> New York<sup>7</sup> and Louisiana<sup>8</sup> are the only American jurisdictions that recognize the validity of negative wills.

Part I of this comment examines the treatment of negative wills in American and English courts. Part II shows that the "American rule" is unsatisfactory because it furthers no important policy underlying the law of wills and because it unnecessarily frustrates the testator's intent. Part III shows that it is proper to apply the implied-gift doctrine to negative wills when a testator expresses a clear intent to exclude an heir or limit the heir's gift to

<sup>5</sup> See *infra* notes 18-19 and accompanying text.

<sup>6</sup> See, e.g., *Quattlebaum v. Simmons Nat'l Bank*, 208 Ark. 66, 70, 184 S.W.2d 911, 913 (1945); *Estate of Lefranc*, 38 Cal. 2d 289, 295, 239 P.2d 617, 621 (1952); *In re Estate of Levy*, 196 So. 2d 225, 229 (Fla. Dist. Ct. App. 1967); *In re Estate of Cancik*, 121 Ill. App. 3d 113, 116-17, 459 N.E.2d 296, 299 (1984); *In re Estate of Eason*, 238 Iowa 98, 101, 26 N.W.2d 103, 105 (1947); *In re Estate of Stroble*, 6 Kan. App. 2d 955, 962, 636 P.2d 236, 242 (1981); *Loring v. Dexter*, 256 Mass. 273, 280, 152 N.E. 356, 358-59 (1926); *In re Estate of Beier*, 205 Minn. 43, 51-52, 284 N.W. 833, 837-38 (1939); *In re Estate of Smith*, 353 S.W.2d 721, 723-24 (Mo. 1962); *In re Estate of Stewart*, 113 N.H. 179, 180, 304 A.2d 361, 362 (1973); *Lawes v. Lynch*, 7 N.J. Super. 584, 590-91, 72 A.2d 414, 418, *aff'd*, 6 N.J. 1, 76 A.2d 885 (1950); *Crane v. Executors of Doty*, 1 Ohio St. 279, 282-84 (1853); *Ritter Estate*, 81 Pa. D. & C. 498, 500 (Orph. Ct. 1952); *Caramatro v. Caramatro*, 78 R.I. 402, 407-08, 82 A.2d 849, 851 (1951); *Blackman v. Gordon*, 19 S.C. Eq. (2 Rich Eq.) 43, 45 (1845); *Condry v. Coffey*, 163 Tenn. 508, 513, 43 S.W.2d 928, 930 (1931); *Najvar v. Vasek*, 564 S.W.2d 202, 207 (Tex. Civ. App. 1978); *Coffman v. Coffman*, 85 Va. 459, 460-61, 8 S.E. 672, 672 (1888); *Estate of Connolly*, 65 Wis. 2d 440, 446-52, 222 N.W.2d 885, 888-91 (1974); see also THOMAS ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 36, at 145 (2d ed. 1953); 4 W. BOWE & D. PARKER, *supra* note 1, § 30.17.

The supreme courts of Kentucky, Michigan, Nebraska, and North Carolina at one time followed the English rule. See *Tabor v. McIntire*, 79 Ky. 505, 507 (1881); *LaMere v. Jackson*, 288 Mich. 99, 103-04, 284 N.W. 659, 661 (1939); *Blochowitz v. Blochowitz*, 130 Neb. 789, 805, 266 N.W. 644, 652 (1936); *Doe ex rel. Hoyle v. Stowe*, 13 N.C. 200, 204 (1830). These states, however, have since adopted the approach followed by a majority of American courts. See *Todd v. Gentry*, 109 Ky. 704, 706-10, 60 S.W. 639, 640-41 (1901); *In re Estate of Brown*, 362 Mich. 47, 51-52, 106 N.W.2d 535, 537 (1960); *In re Estate of Swanson*, 179 Neb. 834, 837-38, 140 N.W.2d 665, 667 (1966); *Ford v. Whedbee*, 21 N.C. 21, 25 (1834).

<sup>7</sup> Although New York courts initially adopted the American rule, see, e.g., *In re Will of Trumble*, 199 N.Y. 454, 465-66, 92 N.E. 1073, 1076 (1910), the New York Wills Act was amended in 1967 to provide that a will may either dispose of property "or direct[] how it shall not be disposed of," N.Y. Est. Powers & Trusts Law § 1-2.18 (McKinney 1981). This statute has been interpreted as authorizing the enforcement of negative wills. See *In re Will of Stoffel*, 104 Misc. 2d 154, 155-56, 427 N.Y.S.2d 720, 721 (Sur. Ct.) (enforcing negative will and interpreting statute as abrogating American rule), *aff'd*, 79 A.D.2d 658, 437 N.Y.S.2d 922 (1980); *In re Will of Beu*, 70 Misc. 2d 396, 398, 333 N.Y.S.2d 858, 859-60 (Sur. Ct. 1972) (same), *aff'd*, 44 A.D.2d 774, 354 N.Y.S.2d 600 (1974).

<sup>8</sup> See *Succession of Allen*, 48 La. Ann. 1036, 1049, 20 So. 193, 198 (1896).

the devise contained in the will. Under this approach, the excluded heir is treated as if he had predeceased the testator, and his share of the intestate portion of the estate is divided among the testator's remaining heirs.

## I. COMMON LAW TREATMENT OF NEGATIVE WILLS

### A. The English Rule

In the eighteenth and early nineteenth centuries, English courts disagreed about whether a negative will could foreclose the award of an intestate share to an excluded heir. In 1706, the House of Lords held in *Vachell v. Breton*<sup>9</sup> that a devise of "10 shillings, and no more" to the decedent's children barred them from receiving an intestate share of the estate.<sup>10</sup> Although the reporter did not provide the court's rationale for this conclusion, the court may have adopted the appellants' argument that granting an intestate share to the testator's children would in effect "mak[e] a new will for him" because he had intended the children to receive only the devise contained in his will.<sup>11</sup>

Most English courts, however, initially avoided the application of the rule in *Vachell*<sup>12</sup> and instead held that a negative will could not prevent an heir from receiving his share of any property that passed by intestacy.<sup>13</sup> Two justifications were offered for this result. First, negative wills were considered to be invalid because, under the law of succession, only an affirmative disposition of the decedent's property could prevent an heir from receiving his inte-

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<sup>9</sup> 5 Bro. P.C. 51, 2 Eng. Rep. 527 (H.L. 1706).

<sup>10</sup> *Id.* at 52-54, 2 Eng. Rep. at 528-29 (emphasis in original).

<sup>11</sup> *Id.* at 53, 2 Eng. Rep. at 528 (argument of counsel for appellants).

<sup>12</sup> Rather than expressly contradict the holding in *Vachell*, some courts distinguished it on various factual grounds. *See, e.g.,* Pickering v. Stamford, 3 Ves. 492, 493, 30 Eng. Rep. 1121, 1122 (Ch. 1797) (distinguishing *Vachell* on the grounds that the heirs in *Vachell* were illegitimate children and that the property passed first to the testator's executors as fiduciaries and then to heirs in a resulting trust, giving greater discretion to the court); *cf. Lett v. Randall*, 3 Sm. & G. 83, 88, 107 Rev. Rep. 26, 29 (Ch. 1855) (enforcing negative will but distinguishing between cases such as *Vachell* where the will on its face did not dispose of all the estate and cases where a devise lapsed after the execution of the will). Most courts, however, gave no specific reason for declining to follow *Vachell*. *See, e.g.,* Sympton v. Hornsby, Prec. Ch. 452, 453, 24 Eng. Rep. 202, 202-03 (Ch. 1716) (asserting that *Vachell* was "nothing like the present case"); Johnson v. Johnson, 4 Beav. 318, 318-19, 49 Eng. Rep. 361, 362 (M.R. 1841) (refusing to enforce a negative will but not discussing *Vachell*).

<sup>13</sup> *See, e.g.,* Denn v. Gaskin, 2 Cowp. 657, 660-61, 98 Eng. Rep. 1292, 1294 (K.B. 1777); Pickering v. Stamford, 3 Ves. 492, 493, 30 Eng. Rep. 1121, 1122 (Ch. 1797); Cresswell v. Cheslyn, 2 Eden 123, 125, 28 Eng. Rep. 843, 844 (Ch. 1762), *aff'd*, 3 Bro. P.C. 246 (H.L. 1763); Sympton v. Hornsby, Prec. Ch. 452, 453, 24 Eng. Rep. 202, 202-03 (Ch. 1716); Johnson v. Johnson, 4 Beav. 318, 318-19, 49 Eng. Rep. 361, 362 (M.R. 1841).

tate share.<sup>14</sup> In addition, negative wills were thought to amount to an impermissible attempt to alter the distribution scheme provided in the intestacy statute.<sup>15</sup>

Despite the initial disagreement, English courts reached a consensus by the mid-nineteenth century that negative wills were enforceable if two conditions were met:<sup>16</sup> the testator clearly expressed an intent to limit an heir to the devise (if any) contained in the will, and at least one other heir remained eligible to receive the intestate property.<sup>17</sup> This result was achieved through the application of the implied-gift doctrine:<sup>18</sup> the negative will was interpreted as a gift of the excluded heir's portion of the intestate property to the testator's other heirs.<sup>19</sup>

## B. The American Rule

Beginning with *Jackson ex rel. Bogert v. Schaubert*<sup>20</sup> in 1827, most American courts have rejected the modern English rule,<sup>21</sup> holding instead that a testator may prevent an heir from receiving his share of any property that passes by intestacy only by affirmatively disposing of the entire estate through a will.<sup>22</sup> Three princi-

<sup>14</sup> See, e.g., *Denn v. Gaskin*, 2 Cowp. 657, 660-61, 98 Eng. Rep. 1292, 1294 (K.B. 1777); *Pickering v. Stamford*, 3 Ves. 492, 493, 30 Eng. Rep. 1121, 1122 (Ch. 1797).

<sup>15</sup> See *Pickering v. Stamford*, 3 Ves. 492, 494, 30 Eng. Rep. 1121, 1122 (Ch. 1797).

<sup>16</sup> These courts did not overrule the earlier decisions but simply adopted narrow constructions of those decisions. See *In re Wynn*, [1984] 1 W.L.R. 237, 240-41 (Ch. 1983) (discussing the development of the current English rule).

<sup>17</sup> See, e.g., *In re Wynn*, [1984] 1 W.L.R. 237, 241 (Ch. 1983); *Lett v. Randall*, 3 Sm. & G. 83, 89-90, 107 Rev. Rep. 26, 30-31 (Ch. 1855); *Bund v. Green*, 12 Ch. D. 819, 821-22 (1879).

<sup>18</sup> For a discussion of the implied-gift doctrine, see *infra* notes 56-82 and accompanying text.

<sup>19</sup> See, e.g., *In re Wynn*, [1984] 1 W.L.R. 237, 241 (Ch. 1983); *Lett v. Randall*, 3 Sm. & G. 83, 89-90, 107 Rev. Rep. 26, 31 (Ch. 1855).

<sup>20</sup> 7 Cow. 186, 194-95 (N.Y. Sup. Ct. 1827), *rev'd on other grounds*, 2 Wend. 15 (N.Y. 1828). In 1967, New York adopted a variation of the English rule by statute. See *supra* note 7.

<sup>21</sup> Many early American decisions relied principally on English cases that had refused to enforce negative wills. See, e.g., *Jackson ex rel. Bogert v. Schaubert*, 7 Cow. 186, 195 (N.Y. Sup. Ct. 1827) (relying on *Denn v. Gaskin*, 2 Cowp. 657, 98 Eng. Rep. 1292 (K.B. 1777), to invalidate negative will), *rev'd on other grounds*, 2 Wend. 15 (N.Y. 1828); *Boisseau v. Alldridges*, 32 Va. (5 Leigh) 240, 258-61 (1834) (*Brooke, J.*) (same). The fact that the English courts have since reexamined and reversed their position on the validity of negative wills, see *supra* notes 16-19 and accompanying text, undercuts the precedential effect of these early American decisions and suggests that American courts should also reexamine their approach.

<sup>22</sup> See, e.g., *In re Estate of Cancik*, 121 Ill. App. 3d 113, 116, 459 N.E.2d 296, 299 (1984) ("The only means by which a testator can disinherit an heir is to give the property to someone else . . .") (citation omitted); *In re Estate of Stroble*, 6 Kan. App. 2d 955, 962, 636

pal rationales have been offered for this approach.<sup>23</sup> First, some courts have reasoned that negative wills violate the intestacy statute,<sup>24</sup> which governs the distribution of property *not* disposed of by will, because they alter the distribution scheme provided in the statute without affirmatively disposing of the estate.<sup>25</sup> Second, neg-

P.2d 236, 242 (1981) (similar); *see also* cases cited *supra* note 6.

<sup>23</sup> In addition to the three rationales discussed in text, two other justifications have been offered for the American rule. First, some courts have reasoned that a negative will is not enforceable because it is not testamentary. *See, e.g., In re Hefner's Will*, 122 N.Y.S.2d 252, 253 (Sur. Ct. 1953). This argument, however, is circular: something is "testamentary" if it is properly done by will. *See, e.g., BLACK'S LAW DICTIONARY* 1322 (5th ed. 1979) (defining "testamentary" as "pertaining to a will"); 1 W. BOWE & D. PARKER, *supra* note 1, § 1.3, at 6 (equating a "will" with a "testamentary disposition"). Moreover, even if the term "testamentary" applied only to an affirmative disposition of property, a negative will could be considered testamentary under the English rule because it does actually dispose of property: the exclusion of an heir in a will constitutes an implied gift of his intestate share to the testator's other heirs. *See infra* notes 65-67 and accompanying text.

Second, at least one court has suggested that a negative will that excluded all of the testator's heirs would effectively nullify the intestacy statute, and a court would not be able to determine who should receive the property. *See Andrews v. Harron*, 59 Kan. 771, 51 P. 885 (1898). This rationale, however, does not justify a blanket prohibition of negative wills. In the rare situation where all of the testator's heirs have been excluded, the property could escheat to the state as provided in the intestacy statute. *See, e.g., UNIF. PROBATE CODE* § 2-105 (1983) ("If there is no taker under the [intestacy statute], the intestate estate passes to the [state]."). Alternatively, the prohibition on negative wills could simply be limited to such rare situations. *See, e.g., In re Wynn*, [1984] 1 W.L.R. 237, 240 (Ch. 1983) ("[A] declaration that none of his next of kin shall take any part of his personal estate, nor his heir-at-law any part of his real estate, can never operate by implication so as to give the Crown a right to the real or personal estate.") (quoting *Lett v. Randall*, 3 Sm. & G. 83, 89, 107 Rev. Rep. 26, 30-31 (Ch. 1855)); *see also* 41 CALIF. L. REV. 758, 760 (1953) (supporting use of implied-gift doctrine only if an heir remains eligible to take).

Although no court has expressly adopted a family-protection rationale, negative wills might also be prohibited where it is thought necessary to protect a testator's close relatives from disinheritance. *See M. RHEINSTEIN & M. GLENDON, THE LAW OF DECEDENTS' ESTATES* 117-20 (1971); *see also Southgate v. Karp*, 154 Mich. 697, 701, 118 N.W. 600, 602 (1908) (refusing to enforce negative will and noting the presumption against disinheritance of heirs). The American rule is an unsatisfactory method of achieving family protection, however, because a testator can still disinherit needy relatives by disposing of the entire estate in his will. *See supra* note 22 and accompanying text. To the extent that family protection is necessary, *see infra* note 35, it is best achieved by other mechanisms such as elective share and homestead provisions. *See, e.g., UNIF. PROBATE CODE* § 2-201 (1983) (elective share); *id.* § 2-401 (homestead allowance).

<sup>24</sup> *See, e.g., ILL. REV. STAT. ch. 110½, § 2-1* (1983) (intestate property "shall be distributed" as provided in statute); *NEV. REV. STAT. § 134.030* (1979) (intestate property "descends and must be distributed" as provided in statute); *UNIF. PROBATE CODE* § 2-101 (1983) (property "not effectively disposed of" by will passes to decedent's statutory heirs).

<sup>25</sup> *See, e.g., In re Estate of Barker*, 448 So. 2d 28, 31 (Fla. Dist. Ct. App. 1984) (testator can disinherit an heir only "by making a testamentary disposition of the property inconsistent with the normal course of descent") (quoting *Annot.*, 100 A.L.R.2d 325, 327-28 (1965)); *Lawes v. Lynch*, 7 N.J. Super. 584, 590, 72 A.2d 414, 418 (decedent can exclude an heir only "by effectively devising and bequeathing his property to others" because "[i]t is the law, not the testator, that confers the right of succession and determines who shall take the property

ative wills have been prohibited on the ground that their enforcement would "mix" the probate and intestacy systems: a decedent's property "must go by devise or descent; and in either mode it goes entirely uncontrolled by the other; and it is impossible to conceive of an estate created by a mixture of the two."<sup>26</sup> Third, some courts have suggested that negative wills are invalid because their enforcement would require "judicial will drafting": the court would have to determine who should receive the excluded heir's intestate share without any guidance from the testator's will.<sup>27</sup>

A few American courts, however, have adopted the English rule,<sup>28</sup> employing a rationale similar to that in *Vachell*.<sup>29</sup> where a testator clearly intended to exclude an heir, the courts should give effect to that intention.<sup>30</sup> In addition, these courts have reasoned that, because the intestacy statute is intended to apply only where the testator has not expressed a more specific intent in a will,<sup>31</sup> the statute should not be used to defeat the testator's express inten-

of which a decedent is intestate"), *aff'd*, 6 N.J. 1, 76 A.2d 885 (1950); *Huffman v. Huffman*, 329 S.W.2d 139, 143 (Tex. Civ. App. 1959) (testator "must make a disposition in favor of another" in order to disinherit an heir because "the law provides how a man's estate shall go at his death unless he by his will plainly directs that it shall go differently"), *aff'd*, 161 Tex. 267, 339 S.W.2d 885 (1960).

<sup>26</sup> *Crane v. Executors of Doty*, 1 Ohio St. 279, 283 (1853); *see also, e.g.*, *Ritter Estate*, 81 Pa. D. & C. 498, 501 (Orph. Ct. 1952) (a negative will cannot deprive an heir of his intestate share because a decedent "must be one of two things—a dead man with a will, or a dead man without one, not a sort of posthumous entity") (quoting Wharton, *Lien of Decedents' Debts in Pennsylvania*, 6 Weekly Notes of Cases 545, 545 (1879)).

<sup>27</sup> *Estate of Connolly*, 65 Wis. 2d 440, 449, 222 N.W.2d 885, 889 (1974); *see also, e.g.*, *Williams v. Norton*, 126 Ark. 503, 511, 191 S.W. 34, 37 (1917) (negative wills are prohibited because "courts cannot make wills for parties").

<sup>28</sup> *See Tabor v. McIntire*, 79 Ky. 505, 507 (1881), *overruled*, *Todd v. Gentry*, 109 Ky. 704, 710, 60 S.W. 639, 641 (1901); *Succession of Allen*, 48 La. Ann. 1036, 1049, 20 So. 193, 198 (1896); *LaMere v. Jackson*, 288 Mich. 99, 103-04, 284 N.W. 659, 661 (1939), *overruled*, *In re Estate of Brown*, 362 Mich. 47, 51-52, 106 N.W.2d 535, 537 (1960); *Blochowitz v. Blochowitz*, 130 Neb. 789, 805, 266 N.W. 644, 652 (1936), *overruled*, *In re Estate of Swanson*, 179 Neb. 834, 837-38, 140 N.W.2d 665, 667 (1966); *In re Will of Beu*, 70 Misc. 2d 396, 398, 333 N.Y.S.2d 858, 859-60 (Sur. Ct. 1972) (construing N.Y. Est. Powers & Trusts Law § 1-2.18 (McKinney 1981) as having abrogated the American rule), *aff'd*, 44 A.D.2d 774, 354 N.Y.S.2d 600 (1974); *Doe ex rel. Hoyle v. Stowe*, 13 N.C. 200, 204 (1830), *overruled by implication*, *Ford v. Whedbee*, 21 N.C. 21, 25 (1834).

<sup>29</sup> *See supra* note 11 and accompanying text.

<sup>30</sup> *See, e.g.*, *Tabor v. McIntire*, 79 Ky. 505, 507 (1881) (where will excluded the decedent's nephew, "there can be no doubt that the totally excluded nephew can take nothing under the laws of descent" because the decedent "had the right to dispose of her property as she wished"), *overruled*, *Todd v. Gentry*, 109 Ky. 704, 710, 60 S.W. 639, 641 (1901); *Blochowitz v. Blochowitz*, 130 Neb. 789, 805, 266 N.W. 644, 652 (1936) (exclusion of the testator's sons in his will "clearly express[es] [his] intent . . . which it is the duty of this court to carry into effect"), *overruled*, *In re Estate of Swanson*, 179 Neb. 834, 837-38, 140 N.W.2d 665, 667 (1966).

<sup>31</sup> *See infra* notes 39-40 and accompanying text.

tion.<sup>32</sup> Following the English approach, these courts have concluded that the exclusion of an heir in a negative will constitutes an implied gift to the testator's other heirs.<sup>33</sup> At present, only two American jurisdictions permit a negative will to foreclose the award of an intestate share to an excluded heir.<sup>34</sup>

## II. THE INADEQUACY OF THE AMERICAN RULE

The principle of testamentary freedom is the cornerstone of the Anglo-American law of succession,<sup>35</sup> and the underlying pur-

<sup>32</sup> See, e.g., *In re Estate of Weissmann*, 137 Misc. 113, 116-17, 243 N.Y.S. 127, 131-32 (Sur. Ct. 1930) (criticizing the American rule but concluding that precedent required that the rule be followed), *aff'd*, 232 A.D. 698, 247 N.Y.S. 901 (1931).

<sup>33</sup> See, e.g., *Tabor v. McIntire*, 79 Ky. 505, 507 (1881), *overruled*, *Todd v. Gentry*, 109 Ky. 704, 710, 60 S.W. 639, 641 (1901); *In re Will of Beu*, 70 Misc. 2d 396, 398, 333 N.Y.S.2d 858, 859-60 (Sur. Ct. 1972) (construing N.Y. ESR. POWERS & TRUSTS LAW § 1-2.18 (McKinney 1981) to require the award of the excluded heir's intestate share to the testator's other heirs), *aff'd*, 44 A.D.2d 774, 354 N.Y.S.2d 600 (1974); see also *Boisseau v. Aldridges*, 32 Va. (5 Leigh) 240, 263-71 (1834) (Tucker, P., dissenting) (arguing that a negative will can constitute a gift by implication of the excluded heir's intestate share to the testator's other heirs); *Estate of Connolly*, 65 Wis. 2d 440, 461-68, 222 N.W.2d 885, 896-99 (1974) (Hansen, J., dissenting) (same). Most American courts, however, have held that a negative will does not create an implied gift to the testator's other heirs. See *infra* note 58 and accompanying text.

<sup>34</sup> See *supra* notes 7-8 and accompanying text.

<sup>35</sup> See, e.g., Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 319, 324, 333 (a "high value" is placed on testamentary freedom in the United States); Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491, 499 (1975) (characterizing the power of testation as the "first principle" and the "preeminent value" of the law of wills); Touster, *Testamentary Freedom and Social Control—After-Born Children* (pt. 1), 6 BUFFALO L. REV. 251, 255 (1957) (describing the principle of testamentary freedom as not only "a natural almost political right, but a natural condition of all law as well"). Several different rationales have been offered to justify the principle of testamentary freedom:

[The power of testation] has been said to be a necessary complement of the immortality of the soul, a stimulus to increased productive or acquisitive activity, a means of maintaining family discipline, and a postulate necessarily flowing from the democratic principle of freedom. Freedom of testation, as an alternative to the fixed, unbending rules of intestacy, permits a property owner flexibility in considering and weighing the individual needs and deserts of the various members of his family as well as of other persons and institutions that may be dependent upon him.

M. RHEINSTEIN & M. GLENDON, *supra* note 23, at 8; see also Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 500-01 (1964). Giving testators the power to devise their property to whomever they wish obviously creates the possibility that they will use this power for arbitrary or spiteful purposes. See, e.g., M. RHEINSTEIN & M. GLENDON, *supra* note 23, at 55 ("The price society has to pay for giving such power to individuals is its potential for abuse for arbitrary, whimsical or even spiteful ends."). The danger of abuse has prompted some commentators to propose additional restrictions upon testamentary freedom. See, e.g., Haskell, *supra*, at 518-26 (proposing forced share for children and provision for needy parents). But the recent relaxation of restrictions upon testamentary freedom, see, e.g., J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 842-62 (3d ed. 1984) (dis-

pose of the law of wills is to implement the testator's intent.<sup>36</sup> Nevertheless, it is proper to restrict testamentary freedom where it conflicts with an overriding public policy, such as family protection or the prevention of "dead hand" control of property.<sup>37</sup> Unless the enforcement of the testator's intent expressed in a negative will would undermine either the principle of testamentary freedom or conflict with some overriding public policy, there can be no justification for the approach taken by a majority of American courts.

#### A. Frustration of the Testator's Intent

The American rule defeats the testator's intention, expressed in a valid will, to exclude an heir. A typical example would occur where a childless testator provides in his will that his sister is to be "deprived of any interest whatsoever" in his estate and that his uncle is to receive the entire estate. If the testator's uncle predeceases him, the devise to the uncle lapses,<sup>38</sup> and the estate will pass by intestacy; if the testator's sister is his heir under the intestacy statute, the American rule requires the award of an intestate share to the sister, even though the testator expressly denied her any part of his estate. In fact, while we can only guess how the testator would have wanted his property to be distributed if it could not go to his uncle, we can be certain of one thing—he did *not* want any of his estate to go to his sister.

The application of the intestacy statute in this situation is also inconsistent with the basic purpose of that statute. The intestacy

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discussing various proposals to reform the rule against perpetuities, which defeats a testator's intent in order to promote the alienability of property); R. WELLMAN, L. WAGGONER & O. BROWDER, *PALMER'S CASES AND MATERIALS ON TRUSTS AND SUCCESSION* 123-25 (4th ed. 1983) (mortmain statutes designed to prevent the disinheritance of close relatives in favor of charities have been repealed in nearly every state), widespread support for testamentary freedom, *see, e.g.*, Fellows, Simon & Rau, *supra*, at 336 (89% of those surveyed believed that there should be no restrictions on the power of testation), and the fact that this power is rarely abused, *see, e.g.*, Friedman, *The Law of the Living, the Law of the Dead: Property, Succession and Society*, 1966 Wis. L. REV. 340, 364, suggest that additional limitations should not be placed on the power of testation.

<sup>36</sup> *See, e.g.*, Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 529 (1982) (the "basic goal" of the Wills Act is to effectuate the testator's intent).

<sup>37</sup> Examples of restrictions on the power of testation include taxation, forced-share or other family-protection legislation, the rule against perpetuities, and various rules against using wills to accomplish illegal purposes. *See generally* M. RHEINSTEIN & M. GLENDON, *supra* note 23, at 55-133; Friedman, *supra* note 35, at 355-65.

<sup>38</sup> In the absence of an applicable anti-lapse statute or a residuary clause in the will, a devise to a person who predeceases the testator lapses and that property will pass by intestacy. *See, e.g.*, 4 W. BOWE & D. PARKER, *supra* note 1, § 30.15, at 110; J. DUKEMINIER & S. JOHANSON, *supra* note 35, at 354-55.



system is designed to implement the testator's *probable* intent in the absence of a will.<sup>39</sup> Where a testator has made a negative will, however, it is anomalous to frustrate his *actual* intent by mechanically following the statutory scheme of intestacy: the testator's own will shows that he preferred his own plan of distribution to that provided by the intestacy statute.<sup>40</sup>

This inconsistency with the principle of testamentary freedom has caused a further problem under the American rule: courts often adopt strained "constructions" of wills in order to circumvent the prohibition on negative wills.<sup>41</sup> In *In re Estate of Weissmann*,<sup>42</sup> for example, the testator, Caesar Weissmann, provided that his property was to pass to the "Estate of Caesar Weissmann," and stated that his niece Adelaide was to take nothing.<sup>43</sup> Since a devise to the testator's "estate" is usually interpreted as a devise to those who would be his heirs under the intestacy statute,<sup>44</sup> the application of the American rule should have resulted in Weissmann's heirs (including his niece Adelaide) receiving his property. In order to give effect to the testator's intent, however, the court interpreted "Estate of Caesar Weissmann" to mean all of Weissmann's heirs *except* Adelaide. Thus, the court was able to hold that none of his estate passed by intestacy.<sup>45</sup>

The use of the "construction" rubric in negative will cases is a highly unsatisfactory method of mitigating the harsh results produced by the American rule. Because there can be no principled

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<sup>39</sup> See, e.g., *Trust Co. Bank v. First Nat'l Bank*, 246 Ga. 222, 223-24, 271 S.E.2d 141, 143 (1980); *Green v. Woodward*, 40 Ohio App. 2d 101, 105-06, 318 N.E.2d 397, 401 (1974); see also Fellows, Simon & Rau, *supra* note 35, at 324 (intestacy statutes should deviate from "the preferred distributive pattern of intestate decedents . . . only if necessary to satisfy an overriding societal interest"). But see Kossow, *The New York Law of Intestate Succession Compared with the Uniform Probate Code: Where There's No Will There's a Way*, 4 FORDHAM URB. L.J. 233, 238-39 (1976) (suggesting that intestacy statutes should promote societal goals rather than the testator's presumed intent).

<sup>40</sup> Cf. Langbein, *supra* note 35, at 499 (testators draft wills because they desire their own plan of distribution).

<sup>41</sup> See, e.g., *Estate of Lefranc*, 38 Cal. 2d 289, 295-302, 239 P.2d 617, 620-25 (1952) (to avoid award of the residue of the estate to heir excluded by no-contest clause, court interpreted testamentary trust to remain in effect until that heir's death); *Strauss v. Strauss*, 363 Ill. 442, 447-52, 2 N.E.2d 699, 702-04 (1936) (construing residuary clause to create a class gift in order to prevent an excluded heir from receiving his intestate share of a lapsed devise).

<sup>42</sup> 137 Misc. 113, 243 N.Y.S. 127 (Sur. Ct. 1930), *aff'd*, 232 A.D. 698, 247 N.Y.S. 901 (1931).

<sup>43</sup> *Id.* at 114-15, 243 N.Y.S. at 130.

<sup>44</sup> See, e.g., *id.* at 118-19, 243 N.Y.S. at 133-34; 4 W. BOWE & D. PARKER, *supra* note 1, § 34.35.

<sup>45</sup> *Estate of Weissmann*, 137 Misc. at 117-19, 243 N.Y.S. at 133-35.

method for determining when a negative will should be "construed" to avoid frustrating the testator's intent,<sup>46</sup> the use of strained constructions imposes costs on the probate system. It creates uncertainty for all parties because they cannot easily predict when a court will strictly apply the American rule and when that rule will be circumvented. This uncertainty increases litigation because both the party contesting the will and the proponent of the will have incentives to litigate: each can argue that his case is distinguishable from prior cases.<sup>47</sup>

## B. Justifications for the American Rule

Courts that refuse to enforce negative wills offer three principal justifications for this limitation on testamentary freedom: (1) negative wills would create an undesirable "mixing" of the probate and intestacy systems by requiring courts to alter the distribution scheme provided in the intestacy statute;<sup>48</sup> (2) because negative wills do not expressly indicate who should receive the excluded heir's share of the property that passes by intestacy, their enforcement would in effect require courts to draft new wills for testators;<sup>49</sup> and (3) negative wills are inconsistent with the law of succession, which generally provides that property not disposed of by the will shall descend as provided in the intestacy statute.<sup>50</sup> None of these rationales, however, withstands analysis.

The first argument—that a decedent's property must pass either by devise or by intestacy but not by a "mixture" of the two systems—simply states a conclusion: no court has explained *why* it would be undesirable to "mix" the probate and intestacy systems. In fact, courts routinely permit such "mixing" in cases of partial testacy: where a will disposes of only part of a testator's estate, the rest of his property passes to his heirs under the intestacy statute.<sup>51</sup> For example, a testator may have devised one-half of his

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<sup>46</sup> Cf. Langbein, *supra* note 35, at 525 (arguing that the rule of strict compliance with Wills Act formalities has produced "results so harsh" that courts have developed "a vast, contradictory, unpredictable and sometimes dishonest caselaw" in order to avoid frustrating testators' intent).

<sup>47</sup> Cf. Langbein & Waggoner, *supra* note 36, at 566 (courts' use of the "construction" rubric in recent mistake decisions permits "litigants defending future claims based upon [those decisions to] object that these were mistake cases in disguise, wrongly decided on account of the failure of the deciding courts to recognize that the no-reformation rule obtains its force from the Wills Act").

<sup>48</sup> See *supra* note 26 and accompanying text.

<sup>49</sup> See *supra* note 27 and accompanying text.

<sup>50</sup> See *supra* notes 24-25 and accompanying text.

<sup>51</sup> See, e.g., *In re Estate of Barker*, 448 So. 2d 28, 31 (Fla. Dist. Ct. App. 1984) ("Noth-

property to his niece and one-half to his aunt. If his aunt predeceases him and his will does not contain a residuary clause, his niece will receive one-half of the estate under the will, and the other half will pass by intestacy.<sup>52</sup>

In situations analogous to negative wills, moreover, "mixing" the probate and intestacy systems is not controversial. For example, courts have little difficulty enforcing a provision in a will that property is to be distributed according to the intestacy statute.<sup>53</sup> Courts will even implement a provision in a will that the testator's property is to be distributed according to the intestacy statute except as modified in one or more respects.<sup>54</sup> Such provisions differ from negative wills in only one way: they incorporate the intestacy statute expressly, while negative wills incorporate the statute implicitly.<sup>55</sup> In either case, a court must enforce a will by examining both the will and the intestacy statute in order to determine how the estate should be distributed. Yet the American rule leads to the anomalous result that courts enforce the express incorporation of the intestacy statute while prohibiting the implied incorporation.

The second and third justifications for the American rule—that enforcing a negative will would require a court to make a new will for the testator and that the exclusion of an heir does not affirmatively dispose of the testator's property as required by the law of succession—rest on the assumption that the mere exclusion of an heir in the will provides a court with no guidance in determining how to distribute the intestate share. This assumption is unjustified, however, because, as will be shown below, the exclusion of an heir in a negative will necessarily constitutes an implied gift of the intestate share to the testator's remaining heirs.

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ing in the law precludes a testator from disposing of only a portion of his estate by will and allowing the balance to be distributed according to the laws of intestate succession.") (citations omitted); 4 W. BOWE & D. PARKER, *supra* note 1, § 30.15, at 107-10 (discussing partial-testacy cases).

<sup>52</sup> See *supra* note 38.

<sup>53</sup> See, e.g., *In re Estate of Smith*, 16 Del. Ch. 272, 278, 145 A. 671, 674 (1929); *Ulman v. Estate of Bock*, 85 S.D. 113, 117, 177 N.W.2d 734, 736 (1970); see also T. ATKINSON, *supra* note 6, § 80, at 392 n.49 ("It would be unthinkable to refuse to recognize the [intestacy] statute as a permissible source of reference.").

<sup>54</sup> See, e.g., *Estate of McGovran*, 190 Pa. 375, 380, 42 A. 705, 705-06 (1899) (*per curiam*).

<sup>55</sup> See *infra* notes 65-67, 76 and accompanying text.

### III. THE IMPLIED-GIFT DOCTRINE AND NEGATIVE WILLS

Courts in England<sup>56</sup> enforce negative wills on the theory that a negative will creates an implied gift of the excluded heir's intestate share to the testator's other heirs.<sup>57</sup> Most American courts, however, have refused to apply the implied-gift doctrine to negative wills on the ground that the testator's intent is ambiguous: he may have wanted the excluded heir to receive only the devise (if any) in his will, or he may simply have intended to express a preference for other beneficiaries of his will over the excluded heir.<sup>58</sup> This reasoning is flawed because it conflates two distinct issues: whether a testator intended to limit an heir strictly to the devise (if any) in the will, and whether a testator who intended his heir to receive only what was devised in the will would have wanted the property that passes by intestacy to go to the remaining heirs. In fact, the testator's intent to exclude an heir will be quite clear in many negative will situations. Rather than presuming that the testator's intent is ambiguous, the courts should first examine the will to determine if his intent is actually ambiguous. The objections raised by these courts can be satisfied if the implied-gift doctrine is applied only where the testator's intent to exclude an heir is clear, not where it is ambiguous.<sup>59</sup>

The implied-gift doctrine has been applied in a wide variety of cases to fill gaps in testamentary schemes,<sup>60</sup> especially where a will fails to provide a gift over following a life estate. For example, where *T* devises "Blackacre to *A* for life, and if *A* dies without children, remainder to *B*," it is not clear what *T* intended in the event that *A* should die *with* children. *T* may have intended to retain a reversionary interest, or he may have wanted *A*'s children

<sup>56</sup> See *supra* notes 18-19 and accompanying text.

<sup>57</sup> Some American jurisdictions also, at one time, enforced negative wills on this theory. See *supra* note 33 and accompanying text.

<sup>58</sup> See, e.g., *In re Estate of Hittel*, 141 Cal. 432, 436-37, 75 P. 53, 54 (1903); *In re Estate of Brown*, 362 Mich. 47, 52, 106 N.W.2d 535, 537-38 (1960).

<sup>59</sup> For examples of cases in which the testator's intent to exclude an heir is ambiguous, see *In re Estate of Barker*, 448 So. 2d 28, 31 (Fla. Dist. Ct. App. 1984) (devise of one dollar each to four heirs did not establish that the testator intended to exclude these heirs); *Loring v. Dexter*, 256 Mass. 273, 276-78, 152 N.E. 356, 357-58 (1926) (provision in will that heirs were disinherited "for the purposes of this will" held insufficient to show that the testator intended to exclude them from receiving an intestate share). For a discussion of the proper treatment of the problem of ambiguous wills, see *infra* notes 68-74 and accompanying text.

<sup>60</sup> See, e.g., Langbein & Waggoner, *supra* note 36, at 538 (courts have implied future interests "where a 'gap' in the disposition was left by the draftsman"). For detailed discussions of the situations in which implied gifts have been found, see 2 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 841-844, 1032-1033 (2d ed. 1956); Browder, *Trusts and the Doctrine of Estates*, 72 MICH. L. REV. 1507, 1531-76 (1974).

to receive Blackacre. In this situation, some courts have refused to infer a remainder to A's children because, "though this may have been the intention of the testator, he did not express it, and the court has no right to make a will for him."<sup>61</sup> Most courts faced with such a gap in the testamentary scheme, however, have found an implied gift to A's children in the event that A should die with children.<sup>62</sup> This result has been justified on the ground that, in most cases, the use of this language reflects T's desire that A's children receive Blackacre.<sup>63</sup> Under this approach, the court considers what the testator probably intended to accomplish and then recognizes a gift by implication where one is necessary to fulfill this intent. While the implication of a gift cannot be based on mere speculation, it need not be the only possible interpretation of the testamentary scheme;<sup>64</sup> if it were the only one, it would be express, not implied.

In the context of negative wills, finding an implied gift to the testator's other heirs also serves to implement the testator's probable intent.<sup>65</sup> It is usually clear that the testator wanted the ex-

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<sup>61</sup> 2 L. SIMES & A. SMITH, *supra* note 60, § 842, at 327; *see also, e.g.*, *Bond v. Moore*, 236 Ill. 576, 589, 86 N.E. 386, 391 (1908); *Hunter v. Miller*, 109 Neb. 219, 224, 190 N.W. 583, 586 (1922).

<sup>62</sup> *See, e.g.*, *In re Blake's Estate*, 157 Cal. 448, 471-72, 108 P. 287, 297 (1910); *Bishop v. Bishop*, 257 N.Y. 40, 50, 177 N.E. 302, 304 (1931); 2 L. SIMES & A. SMITH, *supra* note 60, § 842, at 327-31.

<sup>63</sup> *See, e.g.*, 2 L. SIMES & A. SMITH, *supra* note 60, § 842, at 327; *Langbein & Waggoner*, *supra* note 36, at 538.

<sup>64</sup> *See, e.g.*, *Shea v. Lyons*, 47 Ill. App. 2d 187, 191, 198 N.E.2d 151, 154 (1964) (implication need not be "absolutely irresistible"); *In re Will of Stever*, 273 A.D. 344, 347, 78 N.Y.S.2d 47, 51 (1948) (inference of implied gift does not have to "be irresistible, or such as to exclude all doubts possible to be raised") (quoting *In re Will of Vower*, 113 N.Y. 569, 571, 21 N.E. 690, 691 (1889)); *Willoughby v. Willoughby*, 66 R.I. 430, 438, 19 A.2d 857, 861 (1941) (inference of implied gift must be more than "mere speculation" but need not be "irresistible"); *see also* 95 C.J.S. *Wills* § 595, at 784-86 (1957) (implication does not have to exclude all possible doubt). It has been stated that an implied gift should not be found unless there is "so strong a Probability of Intention, that an Intention contrary to that, which is imputed to the Testator, cannot be supposed." *Wilkinson v. Adam*, 1 V. & B. 422, 466, 35 Eng. Rep. 163, 180 (Ch. 1812); *see also, e.g.*, *Hunter v. Miller*, 109 Neb. 219, 222, 190 N.W. 583, 585 (1922). In practice, however, courts have not adhered to this exacting standard. *See infra* note 65.

<sup>65</sup> Most American courts have refused to find implied gifts to a testator's other heirs on the ground that a negative will "does not give rise to an implication so strong as to leave no reasonable doubt" that the testator intended his other heirs to receive the excluded heir's intestate share. *In re Estate of Cancik*, 121 Ill. App. 3d 113, 117, 459 N.E.2d 296, 299 (1984); *see also, e.g.*, *Estate of Connolly*, 65 Wis. 2d 440, 452, 222 N.W.2d 885, 891 (1974). Although the implied-gift doctrine is commonly formulated in these terms, *see supra* note 64, courts usually infer gifts from the testator's dispositive plan where the implied gift is the most probable interpretation of the testamentary scheme. *See, e.g.*, *In re Estate of Spencer*, 232 N.W.2d 491, 498 (Iowa 1975) (court used implied-gift doctrine to cure default in exercise of

cluded heir to receive only the devise in the will or nothing at all; the testator has simply failed to provide for an alternative disposition of the estate in the event of the failure of a devise. In such situations, English courts have assumed that the testator probably would have wanted his other heirs, not the excluded heir, to receive the property that passes by intestacy.<sup>66</sup> Although this assumption may sometimes be inaccurate (for example, the testator may not have cared who received his property so long as the excluded heir receives nothing), it most closely approximates what most testators would have wanted had they foreseen this contingency.<sup>67</sup> Thus, where a testator clearly intended to exclude an heir in his will and some of the estate passes by intestacy, the testator's intent is best fulfilled by implying a gift of the excluded heir's intestate share to the testator's other heirs.

Courts following the American rule have recognized properly that, under a less restrictive rule, a gift to a testator's other heirs might be inferred where the testator's intent to exclude an heir is ambiguous.<sup>68</sup> This creates a danger that the testator's actual intent might be frustrated.<sup>69</sup> Adopting a per se rule that negative wills

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special power of appointment); *Cretecos v. Lucia*, 335 Mass. 678, 679-80, 141 N.E.2d 833, 834 (1957) (where testator had given beneficiary a house but not the land underneath it, court found gift by implication of right to sufficient use of the land to make the house habitable); see also *supra* text accompanying notes 60-63 (courts usually imply gift over to A's children where will devises "life estate to A, and if A dies without children, remainder to B"). Moreover, the implied-gift doctrine, as formulated by English courts, is very similar to the formulation of the doctrine in American courts, compare 95 C.J.S. *Wills* § 595, at 784 (1957) ("[T]he probability of an intention to make the devise or bequest implied must appear from the will to be so strong that an intention to the contrary cannot reasonably be supposed to have existed in the testator's mind.") (footnote omitted), with 1 C. SHERRIN, R. BARLOW & R. WALLINGTON, *WILLIAMS' LAW RELATING TO WILLS* 740 (5th ed. 1980) (implied-gift doctrine "is based, not on a necessity, but on so strong a probability of intention to benefit the persons in question that a contrary intention cannot be supposed") (footnote omitted), and English courts have had little difficulty in finding the inference raised by a negative will to be sufficient to imply a gift to the testator's other heirs, see *supra* note 19 and accompanying text.

<sup>66</sup> See, e.g., *In re Wynn*, [1984] 1 W.L.R. 237, 240-42 (Ch. 1983).

<sup>67</sup> In a negative will case, a testator has expressed an intent that a certain heir should receive only what was devised in the will, and the award of an intestate share to that heir would defeat his intent. See *supra* note 38 and accompanying text. Although testators generally do not consider the possibility that some of their property might pass by intestacy where they have made a will, see 4 W. BOWE & D. PARKER, *supra* note 1, § 30.15, at 109 (where "testator has attempted to dispose of all his property . . . [he no doubt] thinks that he has accomplished this purpose"), it is probable that the maker of a negative will would have wanted any intestate property to go to his other heirs, not the heir that he specifically excluded, had he considered this possibility.

<sup>68</sup> See *supra* notes 58-59 and accompanying text.

<sup>69</sup> For example, the testator may simply have intended to express a preference for the beneficiaries in the will over the excluded heir. See *supra* note 58 and accompanying text.

cannot prevent an heir from receiving his share of any intestate property,<sup>70</sup> however, is an unnecessarily restrictive response.<sup>71</sup> The evidentiary concern can be satisfactorily addressed, without frustrating the testator's intent in clear cases, by placing the burden of proof<sup>72</sup> on the proponent of the will (the heir who will benefit if another heir is excluded).<sup>73</sup> Extrinsic evidence of the testator's intent at the time the will was executed might also be admitted to resolve any ambiguity about the testator's intent to exclude an heir.<sup>74</sup>

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He may not have intended that the heir be excluded in favor of other heirs who are *not* beneficiaries in the will.

<sup>70</sup> See *supra* text accompanying note 22.

<sup>71</sup> In many cases, the testator's intent to limit an heir to the devise (if any) in the will is clear. See, e.g., *Nagle v. Conard*, 79 N.J. Eq. 124, 134, 81 A. 841, 846 (Ch. 1911) (negative will not enforced even though it provided that heir is not to receive more than the devise in the will "under any circumstances"), *aff'd*, 80 N.J. Eq. 252, 86 A. 1103 (1912); *Condry v. Coffey*, 163 Tenn. 508, 511, 43 S.W.2d 928, 930 (1931) (negative will not valid even though it specified that a certain devise is "all that I intend [the heir] to have out of my estate at any time"). The overinclusive nature of the American rule is most apparent in cases where a testator drafts an instrument that simply provides for the disinheritance of a certain heir and does not contain an affirmative disposition of his estate. In this situation, although the *only* possible interpretation of the testator's intent is that the heir is to be excluded in favor of his other heirs, the American rule still requires the award of an intestate share to the excluded heir. See, e.g., *In re Hefner's Will*, 122 N.Y.S.2d 252, 253-54 (Sur. Ct. 1953) (refusing to enforce negative will that made no affirmative disposition); *Coffman v. Coffman*, 85 Va. 459, 466, 8 S.E. 672, 675 (1888) (same).

<sup>72</sup> This comment uses the term "burden of proof" to refer to both the initial "burden of production" and the "burden of persuasion." For a discussion of the distinction between these two concepts, see EDWARD CLEARY, MCCORMICK ON EVIDENCE § 336 (3d ed. 1984).

<sup>73</sup> In cases where the will provides simply that a certain heir is to receive a small devise or that the heir is disinherited "only for the purposes of this will," see *supra* note 59, the proponents of the will (the testator's other heirs) will not be able to show that the testator would have wanted them to receive the intestate property to the exclusion of the heir whose share was limited. Because testators generally do not consider the possibility that their will might fail to dispose of all their property, see *supra* note 67, it is probable that the testator's limitation of the gift to one heir was intended merely to express a preference for other beneficiaries of the will.

<sup>74</sup> Although there will usually be no extrinsic evidence available on the issue of whether the testator would have wanted his other heirs, not the excluded heir, to receive any intestate property, cf. Langbein & Waggoner, *supra* note 36, at 539 (in cases involving implied future interests, testators usually have not considered what should be done to fill a gap in their testamentary scheme), extrinsic evidence may be helpful in establishing whether the testator intended to limit an heir to what was devised in the will. Where there is an ambiguity in the will, extrinsic evidence at the time of the execution of the will should be admissible to cure this ambiguity. See, e.g., R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 35, at 383; 9 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE §§ 2470-2472 (3d ed. 1940); Langbein & Waggoner, *supra* note 36, at 530 & n.28. In a jurisdiction that holds a strong presumption against the admission of extrinsic evidence to interpret the terms of a will, the enforcement of negative wills may justifiably be denied on this ground. Such a rule should not, however, be used to deny the validity of negative wills in cases where the testator's intent is unambiguous.

Application of the implied-gift doctrine would also satisfy the other objections to negative wills that underlie the American rule.<sup>75</sup> First, a negative will can now be seen as affirmatively disposing of a decedent's property: the exclusion of an heir constitutes a gift by implication of that heir's intestate share to the testator's other heirs. This renders inapplicable the rule that all property not affirmatively disposed of by will must pass according to the intestacy statute. Second, courts are not forced to speculate about who should receive the testator's property because the order of distribution is provided by the intestacy statute: the excluded heir is treated as having predeceased the testator, and the testator's other heirs receive what would otherwise have gone to the excluded heir.<sup>76</sup> Finally, the claim that it is undesirable to "mix" the probate and intestacy systems<sup>77</sup> is satisfied because all of the estate passes under the will; the negative will is no more objectionable on this ground than a will that expressly incorporates the intestacy statute.<sup>78</sup>

The use of the implied-gift doctrine in negative will cases will not unduly burden probate courts. Most testators who want to exclude heirs would not rely solely on this doctrine: in order to foreclose possible litigation over such issues as whether the testator intended to prevent an heir from receiving his share of any intestate property by excluding him in the will, their lawyers will continue to put residuary clauses in wills.<sup>79</sup> The primary beneficiaries of this rule would be unsuspecting testators who, acting without expert legal advice, draft negative wills thinking that they will bar certain heirs from receiving more than the devise (if any) in the will.<sup>80</sup> Thus, this rule would serve to promote the implementation of the testator's intent and would require courts to engage in an inquiry into that intent in only a small class of cases.<sup>81</sup> Moreover,

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<sup>75</sup> See *supra* notes 24-27 and accompanying text.

<sup>76</sup> See, e.g., *In re Will of Beu*, 70 Misc. 2d 396, 399, 333 N.Y.S.2d 858, 861 (Sur. Ct. 1972), *aff'd*, 44 A.D.2d 774, 354 N.Y.S.2d 600 (1974).

<sup>77</sup> For a criticism of this argument, see *supra* notes 51-55 and accompanying text.

<sup>78</sup> See *supra* notes 53-55 and accompanying text.

<sup>79</sup> Cf. Langbein, *supra* note 35, at 524 (arguing that expert draftsmen will not rely on a proposed substantial-compliance doctrine because "they opt for maximum formality, in order to be in the best possible position to defend the will against any claim of imposition or want of finality").

<sup>80</sup> Cf. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1135 (1984) ("[N]ot every client is represented by counsel, much less good counsel, nor do clients inevitably act promptly in accordance with counsel's advice.").

<sup>81</sup> A more restrictive rule would be easier to administer (if the court was willing to accept the harsh results it would produce), but only at the cost of defeating the testator's intent—the very purpose that the law of wills is intended to promote. See *supra* notes 35-



application of the implied-gift doctrine may in fact decrease litigation. By confining the issue to whether the testator's intent was clear, either on the face of the will or with the admission of extrinsic evidence, the results of litigation should be more predictable: there will no longer be any need for escape valves from the American rule—such as creative “construction” of the terms of a will<sup>82</sup>—that are often arbitrarily or inconsistently applied.

### CONCLUSION

Historically, many of the rules of the law of wills have been traps for uninformed draftsmen.<sup>83</sup> Such rules have been disappearing recently because of a growing awareness that they complicate the law of succession without serving any legitimate policy.<sup>84</sup> The American rule that an heir excluded in a negative will must nevertheless be awarded his share of any intestate property should also be discarded because it defeats the testator's intent and furthers no important policy of the law of wills. It should be replaced by the English rule that the express exclusion of an heir in a will constitutes a valid implied gift of his intestate share to the testator's other heirs. This approach best effectuates the testator's intent because a testator who has used a negative will would probably have wanted his other heirs, not the heir excluded in his will, to receive the property that passes by intestacy.

*J. Andrew Heaton*

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36, 38 and accompanying text.

<sup>82</sup> See *supra* notes 41-47 and accompanying text.

<sup>83</sup> If, for example, a testator signed at the beginning of his will instead of at the end, his will would be invalid. See, e.g., T. ATKINSON, *supra* note 6, § 75, at 360 & n.33.

<sup>84</sup> See, e.g., Kossow, *Probate Law and the Uniform Code: "One for the Money . . ."*, 61 GEO. L.J. 1357, 1369-81 (1973) (discussing the recent relaxation of Wills Act formalities).